



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 19, 2011

Ms. Zeena Angadicheril
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2011-07108

Dear Ms. Angadicheril:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 418063 (UT OGC# 135561).

The University of Texas System (the "university") received a request for all "back up [sic] documentation," including correspondence to or from a named individual, relating to the projected rental income of a specified piece of land. You state the university will release some of the requested information. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.104, 552.105, and 552.111 of the Government Code. Additionally, you state that the proprietary interests of AECOM and Cooper Robertson ("Cooper") might be implicated. Accordingly, you provided notice to AECOM and Cooper of the request and their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments submitted by the requestor. *See id.* § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we note you have marked a portion of the information as not responsive because it does not relate to the specified piece of land. We agree this information is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the university need not release such information.

Next, we address the requestor's comments that the requested information is presumed public because the university has already made certain information public. The requestor states, and provides an internet link demonstrating, the university has released an audio recording of proceedings before the university Board of Regents wherein the university addresses an approximate projected rental income for the property at issue. The requestor argues that, because "information regarding rental income has already been made public[,] there would seem to be no basis to withhold the underlying documentation[.]" The Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that same information may not subsequently be withheld from another member of the public, unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(b). In this instance, however, there is no indication that the university has released the backup documentation that is the subject of the present request for information. As such, we will consider the university's arguments for the information at issue.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office reexamined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. ORD 615 at 5; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). Further, section 552.111 does not generally except from disclosure facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 157; ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982). Section 552.111 can also encompass communications

between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

You state the redevelopment of the property at issue is a high profile matter of broad scope and affects the long-term operations, strategy, and policy mission of the university. You further state the university hired Cooper and AECOM to provide financial analysis, recommendations, and expertise as to potential development of the property at issue. Thus, we understand Cooper and AECOM share a privity of interest with the university. Upon our review, we find the information we have marked constitutes advice, opinion, and or recommendations and the university may withhold this information under section 552.111. However, we find the remaining information does not constitute advice, opinion, or recommendation; thus, we find you have failed to demonstrate how the deliberative process privilege applies to the remaining information. Accordingly, the university may not withhold the remaining information at issue on this basis.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 51.951 of the Education Code. Section 51.951 provides in part:

(a) Information related to the location, purchase price, or sale price of real property purchased or sold by or for an institution of higher education, as defined by Section 61.003 [of the Education Code], is confidential and exempt from disclosure under Chapter 552, Government Code, until a deed for the property is executed. Information that is confidential and exempted from disclosure under this subsection includes an appraisal, completed report, evaluation, investigation conducted for the purpose of locating or determining the purchase or sale price of the property, or any report prepared in anticipation of purchasing or selling real property.

Educ. Code § 51.951. We understand that the university is an institution of higher education under section 61.003 of the Education Code. You state that the information at issue relates to a piece of property the university owns, which is "being considered for redevelopment," and the information at issue contains "evaluations and analysis conducted in anticipation of entering into one or more ground leases" of the property. We note section 51.951 expressly applies to only "real property purchased or sold by or for" the university. The statute does not contemplate leasing of property by or for the university. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999) (in interpreting statutes, goal of discerning legislature's intent is served by beginning with statute's plain language because it is assumed that legislature tried to say what it meant and its words are therefore surest

guide to its intent); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 324 (Tex. App.—Austin 2002, no pet.) (“In applying the plain and common meaning of a statute, [one] may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning, especially when [one] can discern the legislative intent from a reasonable interpretation of the statute as it is written.” (citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex. 1994))). As such, we find the university has failed to demonstrate the applicability of section 51.951 of the Education Code to the remaining responsive information, and none of the information may be withheld on this basis.

Section 552.104 excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See Open Records Decision No. 593* (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See Open Records Decision No. 514* at 2 (1988).

The university contends the information at issue is protected under section 552.104. You explain that the university is a marketplace competitor in the commercial real estate marketplace and release of the information at issue would “weaken the [university’s] negotiating position as it attempts to enter into future ground leases, sales, or other transactions for the commercial redevelopment” of the property at issue. You have not, however, explained, or otherwise demonstrated, how release of the remaining responsive information would harm the university’s interests in a particular competitive situation. Therefore, we find you have failed to demonstrate release of the remaining responsive information would cause specific harm to the university’s marketplace interests. Consequently, the university may not withhold any of the remaining responsive information under section 552.104 of the Government Code.

Section 552.105 excepts from disclosure information relating to “appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.” Gov’t Code § 552.105(2). Section 552.105 is designed to protect a governmental body’s planning and negotiating position with respect to particular transactions. *Open Records Decision Nos. 564* at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See ORD 310*. But the protection offered by section 552.105

is not limited solely to transactions not yet finalized. This office has held that section 552.105 applies to leases as well as purchases of real estate. *See* Open Records Decision No. 348 (1982). A governmental body may withhold information “which, if released, would impair or tend to impair [its] ‘planning and negotiating position in regard to particular transactions.’” ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body’s planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body’s good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state the property at issue, to which the information relates, “will likely be the subject of future leases, sales, or other transactions.” However, you fail to demonstrate how release of the remaining responsive information would impair the university’s negotiating position with regard to a particular transaction. As such, the university may not withhold any of the remaining responsive information under section 552.105 of the Government Code.

We note the remaining responsive information contains a public e-mail address.² Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail address we have marked is not a type specifically excluded by section 552.137(c). Accordingly, the university must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner of the address has affirmatively consented to its release under section 552.137(b).³

We next address any interest a third party may have in the remaining responsive information. An interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

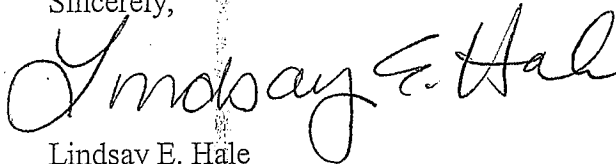
either of the third parties that were notified explaining why their information should not be released to the requestor. Thus, as neither third party has demonstrate that release of the information at issue would implicate their interests, the university may not withhold any of the remaining responsive information on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

In summary, the university may withhold the information we have marked under section 552.111 of the Government Code. The university must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner has consented to its release. The university must release the remaining responsive information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



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Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 418063

Enc. Submitted documents

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